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NO. 85-1163

IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1985

WILLIAM SAMPLE and KAREN SAMPLE, husband and wife, and JAMES SHELTON,
Petitioners,

v.

REGINALD JOHNSON, Deputy Commissioner for the Office of Workers' Compensation Programs for District 14; and SEATTLE STEVEDORE COMPANY; and EDWARD LOPIT; and PAUL TOMITA; and NAHUM LITT, Chief Administrative Law Judge, Office of Administrative Law Judges; and RAYMOND DONOVAN, United States Secretary of Labor,
Respondents

PRIVATE RESPONDENTS' OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES

33 U.S.C. § 914(a) - Payment of Compensation

Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

STATEMENT OF THE CASE

A. Background

This case arises under the Longshore and Harborworker's Compensation Act, 33 U.S.C. § 901 et seq. (hereinafter "Longshore Act"). Petitioners, both longshoremen, are receiving benefits under the Longshore Act and are pursuing this action to obtain an additional recovery under the general maritime law, 28 U.S.C. § 1333. Respondent Seattle Stevedore was the petitioners' employer at the time of their injuries; respondent Ed Lopit is a claims representative for Seattle Stevedore Company; and respondent Paul Tomita is an independent vocational rehabilitation counselor. Petitioners contend that these respondents (hereinafter "private respondents")[1]

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[1]Petitioners' claims against Raymond Donovan, United States Secretary of Labor; Nahum Litt, Chief [cont.]

wrongfully and in bad faith controverted their benefits under the Longshore Act entitling them to damages for emotional distress, consequential damages and punitive damages. The facts with respect to each of the petitioners' claims are set forth below.

B. Petitioner Sample

Mr. Sample contends that he injured his low back on March 28, 1983. He reported his injury to Seattle Stevedore on April 7, 1983, and his treating chiropractor later prepared a report (1) stating that Mr. Sample injured his low back on March 28, 1983, (2) that he was first treated on March 29, 1983, and (3) that there were no "pre-existing

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[cont.] Administrative Law Judge; and Reginald Johnson, Deputy Commissioner for the Office of Workers" Compensation Programs for District 14, are not being pursued before this Court. Pet. for Cert. at ii.

impairments to the area injured." Based upon this report, Seattle Stevedore commenced voluntary payment of benefits under the Longshore Act.

Seattle Stevedore later discovered that Mr. Sample had been treating with his chiropractor for low back pain for six months prior to his alleged injury. He had treated with his chiropractor twice on March 28, 1983, before going to work (he worked the night shift that day). He had also been treating with Group Health Cooperative for a month prior to his alleged injury. He had been advised by his treating doctor at Group Health to stay "strict off work" two weeks before his alleged injury. In addition, he was seen by a second chiropractor on April 1, 1983, three days after the alleged injury, and gave no history of an on-the-job accident. Instead, he reported that his pain had

started a few months earlier with a combination of exercises. He also completed a health insurance claim form indicating that his condition was not due to an injury or illness arising out of his employment. On the same day, he was seen at Group Health Cooperative, and again he gave no history of an on-the-job accident. Instead, he gave a history of his condition being "about the same." Based upon this medical evidence, Seattle Stevedore controverted Mr. Sample's entitlement to benefits under the Longshore Act.[2]

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[2]Mr. Sample continued to receive medical benefits following Seattle Stevedore's controversion, albeit paid by his private insurance carrier. Seattle Stevedore did pay for all medical care it had authorized prior to its controversion, including all hospital bills related to Mr. Sample's chymopapain injections (referred to as "surgery" in the Petition for Certiorari) some two months earlier. In addition, Mr. Sample continued to receive time loss benefits. As a result of Seattle [cont'd]

Mr. Sample's claim was heard before the Office of Administrative Law Judges on March 17, 1984, and by order dated April 24, 1984, the administrative law judge awarded Mr. Sample benefits under the Act. Within ten days thereafter, Seattle Stevedore paid all past-due benefits, together with interest and attorneys' fees. The administrative law judge's decision and order is currently on appeal to the Benefits Review Board.

C. Petitioner Shelton

Mr. Shelton strained his neck on April 26, 1982. He treated with physical therapy and rest until September 24, 1982, when his treating doctor concluded that his condition was stabilized and recommended that his claim proceed

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[cont'd] Stevedore's controversion, his union disability insurance carrier began paying Mr. Sample $275 per week. This is roughly comparable to the $277.22 per week Seattle Stevedore had been paying as compensation prior to its controversion.

toward closing. Seattle Stevedore scheduled Mr. Shelton for a closing examination by a panel of examiners October 29, 1982. The panel concluded that Mr. Shelton had mild degenerative changes in his cervical spine, temporarily aggravated by his industrial injury. The panel rated him as having a 5% total bodily impairment based upon his subjective complaints of pain and concluded that he could return to work as a longshoreman if he were motivated to do so.

Mr. Shelton continued to maintain that he was totally disabled as a result of his injury. Seattle Stevedore therefore authorized vocational rehabilitation services for Mr. Shelton. The vocational counselor, Mr. Paul Tomita, identified a number of job opportunities available to Mr. Shelton within the physical restrictions established by his treating

physician. Mr. Shelton, however, continued to maintain that he was incapable of performing any type of employment. On May 20, 1983, Seattle Stevedore controverted Mr. Shelton's entitlement to compensation under the Act.

Mr. Shelton's claim proceeded to hearing on October 27, 1983, and by order dated February 4, 1984, the administrative law judge awarded Mr. Shelton compensation for permanent partial disability--not total disability as Mr. Shelton was claiming. Seattle Stevedore has fully complied with the administrative law judge's order, including payment of back benefits with interest and attorneys' fees.

D. Proceedings Below

Petitioners brought this action in admiralty alleging that Seattle Stevedore controverted their entitlement to benefits in bad faith and that they were

entitled to damages for emotional distress, consequential damages and punitive damages. Seattle Stevedore moved to dismiss petitioners' complaint under Civil Rules 12(b)(6) and 56 upon the grounds that petitioners' complaint failed to state a claim upon which relief could be granted, and that, as a matter of law, the record contained a reasonable basis for controverting plaintiffs' claims. The District Court granted Seattle Stevedore's motion and the Court of Appeals for the Ninth Circuit affirmed.

REASONS FOR NOT ALLOWING THE PETITION FOR WRIT OF CERTIORARI

A. The Ninth Circuit's Holding That Enactment of the Longshore Act Did Not Automatically Expand the Jurisdiction of the Federal Courts Under 28 U.S.C.§ 1333 Is Consistent With This Court's Decisions in Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971) and Romero v. International Operating Co., 358 U.S. 354 (1959).

It is well settled that a cause of action in tort is cognizable under the

general admiralty and maritime jurisdiction of the federal courts, 28 U.S.C. § 1333, if the tort (1) occurred on the high seas or the navigable waters of the United States, and (2) bears a significant relationship to a traditional maritime activity. Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 34 L. Ed. 2d 454, 93 S. Ct. 493 (1972); Foremost Insurance Co. v. Richardson, 457 U.S. 668, 73 L. Ed. 2d 300, 102 S. Ct. 2654, reh. den. 457 U.S. 668, 74 L. Ed. 2d 160, 103 S. Ct. 198 (1982). Petitioners concede that the traditional test for admiralty jurisdiction has not been satisfied in this case.[3] See Sample v. Johnson, 771 F.2d 1335, 1344, Pet. for

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[3]Petitioners contend that the injuries for which they seek recovery stem "from Seattle Stevedore's land based actions occurring after maritime employment had terminated." Pet. for Cert. at 24-25.

Cert. at A-15 (9th Cir. 1985); Sample v. Johnson, Pet. for Cert. at A-30 to A-32 (W.D. Wash. 1984). Instead, they contend that jurisdiction under 28 U.S.C. § 1333 always attaches to actions brought to remedy violations of maritime statutes. Pet. for Cert. at 17-19.

The Court of Appeals rejected this argument, stating:

> That Congress created statutory obligations under the LHWCA, pursuant to its maritime powers, does not mean that admiralty jurisdiction [under 28 U.S.C. § 1333] automatically attaches where a claim is made under the statute.

Sample v. Johnson, 771 F.2d at 1344, Pet. for Cert. at A-16. This holding is consistent with the prior decisions of this Court. Victory Carriers, Inc. v. Law, 404 U.S. 202, 30 L. Ed. 2d 383, 92 S. Ct. 418, reh. den. 404 U.S. 1064, 30 L. Ed. 2d 753, 92 S. Ct. 731 (1971); Romero v. International Operating Co.,

358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959).

In Victory Carriers, this Court declined to extend the general admiralty and maritime jurisdiction to injuries sustained by longshoremen on land. The Court noted, however, that Congress could exercise its constitutional power to extend the boundaries of the maritime law to cover such injuries,[4] but that in doing so, Congress need not automatically expand the general admiralty jurisdiction of the federal courts under 28 U.S.C. § 1333. As stated by the Court:

> [E]xtending the constitutional boundaries of maritime law would not require Congress to make an equivalent extension of the jurisdiction of the federal courts sitting in admiralty.

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[4]Victory Carriers was decided prior to the enactment of the 1972 amendments to the Longshore Act. Those amendments extended coverage under the Act to land based injuries.

> Congress might well prefer not to extend the jurisdiction of the federal courts.

Victory Carriers v. Law, 404 U.S. at 216. The Court also noted that where Congress enacts a statute pursuant to its constitutional maritime authority, the federal courts should proceed with caution in construing that statute and should "'confine their own jurisdiction to the precise limits which [the federal] statute has defined.'" 404 U.S. at 212, quoting Romero v. International Terminal Operating Co., 358 U.S. at 379-380.

The cases cited by petitioners do not stand for the proposition that admiralty jurisdiction under 28 U.S.C. § 1333 automatically attaches to actions brought to remedy violations of maritime statutes. In Romero v. International Operating Terminals, Inc., supra, the Court considered a claim brought by a Spanish seaman under the Jones Act, 46

U.S.C. § 688, for injuries sustained on a Spanish-owned vessel moored on the navigable waters of the United States. The Court held that the Jones Act gave jurisdiction to the federal courts over claims brought by foreign seamen; however, the Court declined to exercise its jurisdiction in that case based upon choice of law principles. Romero did not involve a violation of a maritime statute, and the Court in Romero did not hold that the federal courts have jurisdiction under 28 U.S.C. § 1333 whenever a violation of a maritime statute is alleged.[5]

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[5]General admiralty jurisdiction under 28 U.S.C. § 1333 was never challenged in Romero because the injury occurred over the navigable waters of the United States. The district court, however, declined to exercise that jurisdiction "as a matter of discretion." 358 U.S. at 358.

Crowell v. Benson, 285 U.S. 22, 76 L. Ed. 598 (1932) provides no greater support for petitioners' position. Crowell was decided under § 921 of the Longshore Act. That section expressly delegates power to the federal courts to interpret and enforce the Longshore Act. The present case does not arise under § 921 of the Longshore Act, and nothing in Crowell v. Benson suggests that Congress intended to expand the jurisdiction of the federal courts under 28 U.S.C. § 1333 by enacting the Longshore Act.

In sum, the Court of Appeals decision in this case is consistent with the prior decisions of this Court. Petitioners have cited no authority in support of their theory that admiralty jurisdiction under 28 U.S.C. § 1333 automatically attaches to cases involving an alleged violation of a maritime statute.

B. The Ninth Circuit's Holding That the Provisions of the Longshore Act Provide the Longshoremen Exclusive Remedy for Failure to Pay Compensation Is Consistent With This Court's Decisions in National Railroad Passengers Corp. v. National Association of Railroad Passengers, 414 U.S. 453 (1974), Switchmens' Union of North America v. National Mediation Board, 320 U.S. 297 (1943), and Mobile Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

When a statute establishes a right and specifies a particular remedy or remedies to enforce that right, the courts will not expand the coverage of the statute to include other remedies. National Railroad Passengers Corp. v. National Association of Railroad Passengers, 414 U.S. 453, 458, 38 L. Ed. 2d 646, 94 S. Ct. 690, reh. den., 415 U.S. 952, 39 L. Ed. 2d 568, 94 S. Ct. 1478 (1974). Switchmen's Union of North America v. National Mediation Board, 320 U.S. 197, 88 L. Ed. 2d 61, 64 S. Ct. 95 (1943). As stated by this Court:

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. . . . [I]t is for Congress to determine how the rights which it creates shall be enforced. In such a case the specification of one remedy normally excludes another.

Switchmens' Union of North America v. National Mediation Board, 320 U.S. at 301 (citations omitted).

The Longshore Act establishes a detailed and pervasive scheme of both rights and remedies. For example, the Act requires the employer to notify the deputy commissioner within ten days of any injury resulting in time loss. 33 U.S.C. § 930(a). An employer who knowingly and willfully fails or refuses to file such a report, or additional reports as may be required by the Act, or who knowingly or willfully makes a false statement or misrepresentation on any

such report is subject to a civil penalty not to exceed $10,000. Id. § 930(e). See also, id. § 931(a)(1). Once a report is filed, the employer must pay compensation periodically, promptly and directly to any person entitled thereto, without an award, except where liability to pay compensation is controverted. Id. § 914(a). If the employer fails or neglects to pay for medical care, the employee may pay for such treatment himself and recover any amount expended by him. Id. § 907(d). If the employer fails to pay compensation within 14 days after it becomes due, a penalty of 10% is added to the amount due, unless the deputy commissioner finds that the failure to make payment was for good cause. Id. § 914(e). If the employer controverts the right to compensation, it must so notify the deputy commissioner setting forth the grounds upon which the

right to compensation is controverted. Id. § 914(d). The claimant may then either request an informal conference or ask that the matter be referred to the Office of Administrative Law Judges for a formal hearing. Id. § 919(c) & (d); 20 C.F.R. §§ 702.261-702.273. If the employer's controversion is without basis in fact, the claimant may request summary judgment. 29 C.F.R. § 18.40. If the claimant utilizes the services of an attorney and is successful in establishing his claim, he is entitled to an award of attorney's fees and costs. 33 U.S.C. § 928. If it is determined that there has been a underpayment of compensation, the claimant is entitled to prejudgment interest. Grant v. Portland Stevedore Co., 16 Ben. Rev. Bd. Serv. 267 (1984). If the employer appeals a decision awarding benefits, it must pay compensation pending an appeal, absent a

showing of irreparable injury. 33 U.S.C. § 921(b)(3). Appeals of compensation orders are taken first to the Benefit Review Board and then to the United States Court of Appeals for the circuit in which the injury occurred. Id. § 921(c). If compensation is not paid under the terms of an award within ten days after it becomes due, a penalty of 20% is added thereto. Id. § 914(f). If an employer fails to comply with the compensation order making an award that has become final, the beneficiary may apply to the federal district court for enforcement. Id. § 921(d). If there has been a default in the payment of any installment due under an award, the deputy commissioner may, in his discretion, accelerate the payments due under the award and declare the entire amount in default. Id. § 918(a). If a beneficiary applies for enforcement of

an award in federal district court, he may obtain judgment for the amount of the default as determined by the deputy commissioner. Id.

Petitioners seek to supplement the remedies available to them under the Longshore Act with additional remedies under the general maritime law.[6] This Court considered a similar request in Mobile Oil Corp. v. Higginbotham, 436 U.S. 618, 56 L. Ed. 2d 581, 98 S. Ct. 2010, reh. den., 436 U.S. 618, 58 L. Ed. 2d 200, 99 S. Ct. 232 (1978). In

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[6]Petitioners contend that none of the Act's remedies applies to "an insurer's bad faith handling of a compensation claim." Pet. for Cert. at 25. The Act does, however, expressly address failure to file reports, false statements and misrepresentation by employers and/or their insurance carriers. 33 U.S.C. § 930(e). In addition, the Act contains numerous other penalties. See e.g., id. §§ 914(e), 914(f) & 928. As stated by the district court in this case, "The apparent purpose of these penalties is to discourage the very sort of behavior alleged here." Pet. for Cert. at A-45.

Higginbotham, the plaintiff brought a wrongful death action in admiralty. The actions was covered by the Death on the High Seas Act which entitled the plaintiff to "fair and just compensation for pecuniary loss," but did not provide for recovery for loss of society. 46 U.S.C. §762. Damages for loss of society is allowable under the general maritime law. Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573, 39 L. Ed. 2d 9, 94 S. Ct. 806 (1974). The Court of Appeals held that the plaintiff could supplement the remedies available to her under the Death on the High Seas Act and recover damages for loss of society under the general maritime law. This Court reversed, stating:

> There is a basic difference between filling a gap left by Congress's silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more

> appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. Perhaps the wisdom we possess today would enable us to do a better job . . . than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

436 U.S. at 625-26.

Petitioners argue that this precedent does not apply in this case because their claims are not covered by the Longshore Act--they lack the requisite situs and status. See Herb's Welding v. Grey, ___ U.S. ___, 105 S. Ct. 1421 (1985). Thus, petitioners contend, on one hand, that the federal courts have admiralty jurisdiction because this case involves an alleged violation of a maritime statute, Pet. for Cert. at 17, 19, and, on the other hand, that the remedies provided by the statute are not exclusive because

their injuries are not covered by the Act. Id. at 24-25. Petitioners cannot have it both ways. The right which petitioners allege was violated in this case--the right to payment of compensation--is covered by the Longshore Act and, therefore, they must rely upon the remedies contained in the Longshore Act to enforce that right. As stated by one court:

> There can be no escaping the conclusion that except for the [Longshore Act] there could be no mishandling of compensation. Since the right to compensation comes from the LHWCA, the right to damages for mishandling the compensation also arises from the Act.

Texas Employers Insurance Association v. Jackson, 618 F. Supp. 1316, 1321 (D. Tex. 1985). Accord National Railroad Passengers Corp. v. National Association of Railroad Passengers, supra; Switchmen's Union of North America v.

National Mediation Board, supra; and Mobile Oil Corp. v. Higginbotham, supra.

The only authority cited by appellants that supports the proposition that the remedies under the Longshore Act are not exclusive is Martin v. Travelers Insurance Co., 497 F.2d 329 (1st Cir. 1974).[7] Martin is easily distinguished from the case at bar. In Martin, an insurance carrier failed to pay compensation pursuant to an award of compensation made following a hearing. Id. at 330. In the present case, Seattle Stevedore

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[7] Appellants have also cited Stafford v. Westchester Fire Insurance Co., 526 P.2d 37 (Alaska 1974). Pet. for Cert. at 27. Stafford is a state case and was not decided under the Longshore Act. Workers' compensation statutes vary widely from state to state, as do the policies of the courts that interpret them. Nevertheless, the majority of the courts considering the issue of whether the penalty provisions of state workers' compensation statutes are exclusive have reached a contrary result. See Annot., 8 A.L.R. 4th 902 (1984).

controverted benefits prior to a hearing and has in all respects complied with the compensation orders issued following a hearing. The Longshore Act expressly provides for controversion prior to a hearing. As stated in the Act,

> Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

33 U.S.C. § 914(a) (emphasis added). Thus, in this case, Seattle Stevedore fully complied with the provisions of the Longshore Act.

In addition, it should be noted that the holding in Martin v. Travelers Insurance was reached without citation of authority and has been heavily criticized by other federal courts. As stated by one court:

> The defendant holds out Martin v. Travelers Insurance Co., 497 F.2d 329 (1st Cir. 1974), as support for his contention that he should be able to file a lawsuit in state court for the carrier's alleged bad faith conduct in administering LHWCA compensation payments. This court does not find Martin persuasive on several grounds. That case appears to be alone in its conclusion as to the preemptive effect of the LWHCA. Not only is there no authority in the text of the opinion which supports the conclusion, but the case appears not to have been cited as authority by any other federal court. Perhaps more tellingly, it is noted that since Martin has been decided, the Supreme Court has issued [Allis-Chalmers Corp. v. Lueck, ___ U.S. ___, 85 L. Ed. 2d 206, 105 S. Ct. 1904 (1985)] and other cases which strongly indicate Martin may have been decided differently today.

Texas Employers & Insurance Association v. Jackson, 618 F. Supp. 1316, 1321 (D. Tex. 1985). Accord, Sample v. Johnson, 771 F.2d 1335, 1347, Pet. for Cert., at

A-21 to A-22 (9th Cir. 1985); Sample v. Johnson, Pet. for Cert. at A-49 (W.D. Wash. 1984).

Finally, the holding in Martin v. Travelers Insurance is inconsistent with this Court's decision in Victory Carriers, Inc. v. Law, 404 U.S. 202, 30 L. Ed. 2d 383, 92 S. Ct. 418 (1971). In Victory Carriers, this Court was unwilling to allow a longshoreman the "opportunity for circumventing" the provisions of a state workers' compensation law by creating a cause of action in admiralty. 404 U.S. at 212. The court in Martin, however, allowed workers covered by the Longshore Act the opportunity to circumvent provisions of the Longshore Act by filing a cause of action in state court. See 467 F.2d at 331. The deference extended by this Court to acts of the state legislature

should apply with equal force to acts of Congress.

In sum, the decision of the Court of Appeals in this case is consistent with the prior decisions of this Court. The only case that supports petitioners' position in this case is Martin v. Travelers Insurance Co., supra. That case is a relatively old one and was decided without citation of authority. It does not represent a current dispute of any moment among the circuits, and, as stated by the court in Texas Employers Insurance Association v. Jackson, supra, it is doubtful that the court in Martin would reach the same result today. 618 F. Supp. at 1321. Moreover, the Martin case is easily distinguished from this case on its facts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully Submitted

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